



REPUBLIC OF KENYA



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Kibunja v Njurai (Suing as the Legal Administrator of the Estate of the Late Agnes Wambui Njoroge (Deceased)) & another (Civil Appeal E007 of 2024) [2024] KEHC 15092 (KLR) (23 October 2024) (Ruling)

Neutral citation: [2024] KEHC 15092 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAHURURU
CIVIL APPEAL E007 OF 2024
AK NDUNG'U, J
OCTOBER 23, 2024**

BETWEEN

JOHN CHEGE KIBUNJA APPELLANT

AND

PETER NJOROGE NJURAI (SUING AS THE LEGAL ADMINISTRATOR OF THE ESTATE OF THE LATE AGNES WAMBUI NJOROGE (DECEASED)) 1ST RESPONDENT

NELSON NJURAI NJOROGE (SUING AS THE LEGAL ADMINISTRATOR OF THE ESTATE OF THE LATE AGNES WAMBUI NJOROGE (DECEASED)) 2ND RESPONDENT

RULING

1. This ruling resolves the Notice of Motion dated 21st March, 2024 seeking orders;
 - i. Spent.
 - ii. Spent
 - iii. That pending the hearing and determination of the Applicants' appeal, there be a stay of execution of the judgement delivered on 26th July 2023, decree and all consequential orders arising therefrom in Rumuruti SPMCC No. E002 of 2023; *Peter Njoroge Njurai (Suing as the Legal Administrator of the estate of the late Agnes Wambui Njoroge (Deceased)) & Another -vs- John Chege Kibunja.*
 - iv. That the costs of this application be provided for.
2. The application is supported by the affidavit of John Chege Kibunja and on grounds;



- a. That the Appellant herein was the Defendant in Rumuruti SPMCC No. E002 of 2023 and only became aware of the suit upon being served with a copy of a decree and proclamation notice by M/S Direct “O” Auctioneers.
 - b. That immediately the Appellant instructed the firm of M/S Waichungo Martin & Co. Advocates to file an application for setting aside the exparte judgment entered on the 26th July, 2023.
 - c. That on the 7th March, 2023 the application was dismissed with costs.
 - d. That the Appellant reiterates that he was never served with summons to enter appearance and other court pleadings in the matter.
 - e. that the Respondents have commenced execution of the exparte judgment delivered on the 26th July, 2023 and it is only fair and just that the judgment be stayed pending the hearing and determination of the appeal.
 - f. That the Appellant is willing to deposit a security in court.
 - g. That the appeal filed herein has high chances of success.
 - h. That it is only fair that orders sought be granted to enable the appeal to be heard and for the Appellant to participate in the suit.
3. The application was opposed and in a replying affidavit Peter Njoroge Njurai states that the application herein lacks merit and should be dismissed with costs as no proper grounds have been shown to warrant granting of the orders sought and that allowing stay of execution of the Judgment delivered on 26th July, 2023, and the decree arising from Rumuruti SPMCC No. E002 of 2023 – *Peter Njoroge Njurai (Suing as the legal administrator of the estate of the late Agnes Wambui Njoroge (Deceased) & Another vs John Chege Kibunja*, will be unfair and unjust to the Respondents who are entitled to enjoy the fruits of their judgment.
 4. P[eter avers that the Appellant was duly served with the appropriate summons and pleadings before the commencement of the Rumuruti SPMCC No. E002 of 2023 and the trial Magistrate through his judgment affirmed that service was properly effected and the Appellant intentionally failed to enter appearance and the Appellant cannot dispute the mode of service as it was proper and done in accordance with Order 5 Rule 22B of the [Civil Procedure Rules 2020](#).
 5. Further, that the Appellant had filed an application of stay of execution and setting aside of interlocutory judgment which was not accompanied by a draft defence which we argued was fatal to their application in our replying affidavit.
 6. That the honourable Magistrate was fair in delivering his ruling and dismissing the application and commencement of execution of the decree was done legally as all concerned parties were given notice, and there was no stay of execution of the judgment.
 7. That the appeal has low chances for success as due process was followed in institution, service and determination of the Rumuruti SPMCC No. E002 of 2023 in the trial court.
 8. It is the respondent’s case that there has been no reasonable explanation offered by the Applicant for the delay in the filing of appeal and the same should be denied as equity aids the vigilant and not the indolent.
 9. Finally, Peter seeks costs of the discontinued application dated 20th March, 2024.



10. The application was canvassed by way of written submissions. The Applicant through his counsel filed written submissions dated 20th May, 2024 and the Respondent through Ms. Ngotho Waweru and Company filed submissions dated 4th June, 2024.
11. I have had occasion to consider the application, the response thereto and learned submissions on record. Of determination is whether the Applicant has established to the required degree the threshold for grant of stay pending appeal.
12. The principles upon which this honourable court may stay the subject judgment are laid down under Order 42 Rule 6 of the *Civil Procedure Rules* which stipulates;

“No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order stay of execution of such decree or order and whether the application for such stay shall have been granted or refused by the court appealed from the court to which such appeal is preferred shall be at liberty on application being made consider such application and to such order thereon as may to it seem just any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such orders set aside.

No order for stay of execution shall be made under sub rule 1 unless:-

- a. The court is satisfied that substantial loss may result to the Applicant unless the order is made and that the application has been made without unreasonable delay; and
 - b. Such security as the court orders for due performance of such decree or order as may ultimately be binding on him has been given by the Applicant.”
13. It is the Applicant’s case that he would suffer substantial loss if the judgement is not stayed. It is urged that the Respondents did not address the issue of whether they are able to pay the decretal amount if the same is paid to them hence the Appellant’s averments that the Respondents are not in a position to refund the decretal amount have not been refuted by the Respondents and therefore their financial position is unclear/ not known as no evidence has been attached.
 14. The rationale behind the grant of stay on the basis that substantial loss might be occasioned stems from the discernible need to cushion a party who may end up paying a decretal amount to a decree holder who would not be in a position to refund the paid amount should the Appellant succeed on appeal thus defeating the very essence of an appeal.
 15. In the case of *Nicholas Stephen Okaka & Another -vs- Alfred Waga Wesonga* [2022] eKLR the court held as follows;

“ 25. In the instant case, the Applicants aver that they stand to suffer substantial loss of over Kshs.503,050/- as well as costs and interest if stay of execution is not granted. They further aver that the Respondent has not demonstrated that he is able to refund the sum if the appeal succeeds....

26. On his part, the Respondent has not addressed the issue of stay of execution but instead delved into merits of the appeal....

28. In this case, the Respondent has not given any material as to his ability to repay the decretal sum in the case appeal succeeds an in light of the dispositions by the



Applicant’s counsel that they will suffer substantial loss if stay is not granted. Accordingly, I am persuaded that substantial loss has been proved.”

16. The second requirement in an application for stay pending appeal is the furnishing of security. It is always a delicate balancing act. On the one hand, the court has before it an appellant who has a decree against him but who retains the right to appeal and which appeal could overturn the decree, and on the other hand, before the court is a Respondent who has obtained judgement in his favour and who is entitled to enjoy the fruits of his judgement.
17. Consequently, the furnishing of security becomes a necessary cushion against any loss on the part of the decree holder and protection against loss by the Appellant should the appeal be successful. In *R W W v E K W* [2019] eKLR the court considered the purpose of stay of execution order pending appeal, in the following words;

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the Appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.

Indeed, to grant or refuse an application for stay of execution pending appeal is discretionary. The court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”

18. In the case of *Jamii Bora Bank Limited & Another -vs- Samuel Wambugu Ndirangu* [2022] eKLR, the learned judge held that;

“.....it is clear that the issue of security is discretionary and it is upon the court to determine the same. Notably, in their submissions, the Applicants stated they are willing to offer security if called upon by this honourable court to do so.”

19. It is the submission of the Applicant that he is willing and ready to abide by any terms as would be directed by this honourable court and that the Respondents are not entitled to costs of the withdrawn application.
20. While I agree with the Respondent’s submission that execution of a decree is a lawful process, where an applicant is able to prove that his victory on appeal would end up being a pyrrhic one, an order of stay becomes available to protect such a party.
21. I am of the persuasion that an order of stay issued on condition that the entire decretal sum be secured would serve the interests of justice in this matter.
22. Respondent sought costs of an earlier withdrawn application in the matter. I direct that such costs abide the outcome of the appeal.
23. With the result that the application dated 21st March, 2024 is successful and is allowed. I make the following orders;
 - a. That a stay of execution of the judgement delivered on 26th July 2023, decree and all consequential orders be and is hereby granted.



- b. That the Applicant is to deposit the decretal sum of Kshs. 1,218,370 in an interest earning account in the joint names of the Advocates on record for the parties within 45 days hereof.
- c. In default of such deposit as in (b) above, the stay lapses.
- d. That costs of the application to abide the outcome of the appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 23RD DAY OF OCTOBER 2024

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A.K. NDUNG’U

JUDGE

